STATE OF MICHIGAN

IN THE SUPREME COURT

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs/Appellees/Cross-Appellants,

v

STATE OF MICHIGAN,

Defendant/Appellant/Cross-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, a Florida corporation, GAMING ENTERTAINMENT (Michigan), LLC, a Delaware limited liability company, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervening Defendants/Appellants/ Cross-Appellees.
_____/

Supreme Court Nos. 129822; 129818

Court of Appeals No. 225017

Ingham County Circuit Court
Case No. 99-90195-CZ

THIS APPEAL INVOLVES A RULING THAT A STATE GOVERNMENTAL ACTION IS INVALID

BRIEF OF PLAINTIFF-APPELLEE TAXPAYERS OF MICHIGAN AGAINST CASINOS ("TOMAC")

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BASIS OF JURISDICTION

Plaintiff-Appellee Taxpayers of Michigan Against Casinos ("TOMAC") agrees with Defendant the State of Michigan and Intervening Defendant Little Traverse Bay Bands of Odawa Indians that the Court has jurisdiction over this matter pursuant to MCL 600.215 and MCR 7.301(A)(2). This Court held in *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC I*"), that the Tribal-State gaming compacts at issue were contracts which the Legislature could permissibly ratify by resolution. *Id.* at 312. This Court remanded to the Court of Appeals the question of whether Governor Granholm's amendment to one of the compacts (the "Granholm Amendment") violated the separation of powers clause of the Constitution, Const 1963, art 3, § 2. The Court of Appeals held in *Taxpayers of Michigan Against Casinos v State*, 268 Mich App 226; 708 NW2d 115 (2005) ("*TOMAC II*"), that the amendment provision of the compacts was facially unconstitutional. The Court of Appeals did not address the constitutionality of the Granholm Amendment. The parties each applied for leave to appeal, and this Court granted all three applications on March 29, 2006.

QUESTIONS PRESENTED FOR REVIEW

1. Does the amendment provision in the Tribal-State gaming compacts, which purports to empower the Governor to amend the compacts unilaterally, violate the separation of powers clause, Const 1963, art 3, § 2?

The Court of Appeals answered: Yes.

TOMAC answers: Yes.

State and Intervener answer: No.

2. Are provisions in both the "Granholm Amendment" and the original compacts unconstitutional because they divert gambling payments to recipients other than the State Treasury without a supporting legislative appropriation?

The Court of Appeals did not directly address this question.

TOMAC answers: Yes.

State and Intervener answer: No.

INTRODUCTION

The Court of Appeals correctly held in *TOMAC II* that the Legislature's purported delegation to the Governor—by resolution—of the power to amend Tribal-State gaming compacts (without further legislative oversight) violated the Michigan Constitution's strict separation of powers. As Judge Schuette correctly stated in his majority opinion:

> the delegation of authority to amend a gambling compact was conferred by a resolution, a nonstatutory means. . . . Absent a statutory delegation of authority by the Legislature to the Governor to amend a gambling compact, and being mindful of the constitutional prohibition that forbids the executive branch from assuming duties of the legislative branch unless expressly provided for in the Michigan Constitution, any amendment to a gambling compact must be presented to the Legislature for approval, at the very least by legislative resolution.

TOMAC II, 268 Mich App at 241-242; 708 NW2d 115 (emphasis added). *Accord TOMAC I*, 471 Mich at 407; 685 NW2d 221 (Markman, J, dissenting) ("The legislature may not, either by resolution or by bill, delegate to the executive branch a broad and undefined power to amend legislation."). On this point, the Court of Appeals should be affirmed.

A study of the Granholm Amendment's particular provisions, which this Court specifically directed on remand,[1] further highlights a fundamental problem with not only the Amendment, but also the original structure of the compacts themselves, namely, the designation of recipients other than the State's general fund for tribal revenue sharing payments. The original compacts directed these payments to the Michigan Strategic Fund, a quasi-governmental corporation, and the Granholm Amendment directed payments to whatever recipient the Governor designated, in her unbridled discretion. Neither provision directed payments to the

[1] "[A] majority of the Court agrees that the issue whether the Governor's *recent amendments* violate the Separation of Powers Clause should be remanded for Court of Appeals consider-ation." (State Application for Leave at 7, quoting *TOMAC I*, 471 Mich at 350; 685 NW2d 221 (emphasis in State's Application).)

State's general fund, even though the State Treasury is the only proper recipient for State funds when there has been no legislative appropriation. MCL 18.1441 (receipts of state government "from whatever source" must be deposited pursuant to directives by the State treasurer). Because the payment terms of the compacts are expressly non-severable, TOMAC respectfully requests that this Court declare void not only the Granholm Amendment, but the four underlying gaming compacts as well.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The Compacts and Their Amendment Provision

In January 1997, Michigan's Governor negotiated and signed four compacts with each of four Indian Tribes: the Little Traverse Bay Bands of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Huron Potawatomie. *TOMAC I*, 471 Mich at 316; 685 NW2d 221. The purpose of these compacts was to authorize four new Indian casinos in the State of Michigan. The compacts allow the Governor to amend their terms without additional legislative approval of any kind. Rather, any amendment is to be initiated and negotiated by the Indian tribe and Governor, "who shall act for the State." (Compacts § 16(A)-(C), App 20a-21a.[2]) The Legislature has no opportunity for prior approval of, or even consultation on, proposed amendments. Rather, the Governor merely informs the Legislature after the amendment is effective, and she has purportedly bound the State to whatever amendment provisions she approves. (Compacts § 16(D), App 21a.)

[2] Since the relevant terms of the compacts are identical, a single compact is attached at App 3a. All Appendix references in this brief refer to Plaintiff TOMAC's Appendix, submitted in Supreme Court Case No 129816.

The Michigan Supreme Court Holds the Compacts are Contracts

TOMAC sought a declaratory ruling that the compacts violated Michigan's Constitution because, among other things, the compacts were legislation that could only be approved by bill, and the amendment provision violated the separation of powers between the executive and legislative branches. In an Opinion dated January 18, 2000, the Ingham County Court agreed, declaring that the compacts violated the separation of powers by giving the Governor unrestricted authority to amend their terms. (Circuit Ct Op at 2, 16, App 32a, 46a.) On November 12, 2002, the Court of Appeals reversed and held that the amendment issue was not ripe for review. *Taxpayers of Michigan Against Casinos v State*, 254 Mich App 23, 47, 48; 657 NW2d 503 (2002).

This Court granted leave to appeal and, in an Opinion dated July 30, 2004, ruled that the compacts were contracts and remanded to the Court of Appeals the question of the constitutionality of the compact amendment provision. *TOMAC I*, 471 Mich at 313; 685 NW2d 224. This Court also directed the Court of Appeals to consider specifically the constitutionality of the Granholm Amendment. *TOMAC I*, 471 Mich at 350; 685 NW2d 221 ("a majority of the Court agrees that the issue of whether the Governor's recent amendments violate the Separation of Powers Clause should be remanded for Court of Appeals consideration.") (Kelly, J, concurring).

The Granholm Amendment

On July 22, 2003, Governor Granholm had purportedly exercised her right to amend the Odawa compact. (App 61a.) The Governor's Amendment included dramatic departures from the original terms of the compacts, and demonstrated the unbridled scope of the amendment power. The Amendment:

- **Gives the Governor control over casino revenue sharing payments made to the State.** Previously, the compact required that all revenue sharing payments flow to the Michigan Strategic Fund ("MSF"). Now, all such payments are to go "to the State, as directed by the Governor or designee." (Compact Amendment § 17(C), App 63a.) Thus, the Governor can apparently send millions of dollars to whatever agency, department, or quasi-governmental unit she chooses.

- **Gives the Little Traverse Bay Bands of Odawa Indians (the "Odawa") an extra casino.** (Compact Amendment § 2(B)(1), App 61a.) The original Odawa gambling compact, like the other compacts challenged in this case, limited the Odawa to one casino. Now they can have two.

- **Changes the age of legal gambling at the new casino from 18 to 21.** (Compact Amendment § 4(I), App 62a.) The implications of this change, however salutary on policy grounds, are troublesome: the Governor alone can now set the legal gambling age under the compacts, or do away with the restriction altogether.

- **Conditions casino revenue payments to the State upon the existence of a casino monopoly in a ten-county area and a moratorium on new lottery legislation. (**Compact Amendment § 17(B)(2), App 62a.) If a "change in State law is enacted" allowing gambling in a ten-county area, "including expansion of lottery games beyond that allowable under State law on the date of execution of this document," then payments to the State cease. In effect, a government-sanctioned, ten-county monopoly has been created, and payments have been arranged to help protect the future of the monopoly.

The Governor purported to bind the State to all of these changes for 25 years (Compact Amendment § 12(A), App 62a), which is more than three times the length of the Governor's eight-year term limit, and five years longer than the term of the original compacts (App 18a).

The Court of Appeals on Remand

On remand, the Court of Appeals held that the amendment provision was facially unconstitutional because the Legislature approved it by resolution, rather than statute. In his majority opinion, Judge Schuette began by emphasizing the importance of a strict separation of the executive and legislative powers:

> Although the lines separating the three branches of state government may converge from time to time, they are distinct boundaries,

> not mirages. . . . Of significance in [Const 1963, art 5, § 8] is the specific, stated responsibility of the Governor to faithfully execute laws. Conspicuously absent is any reference whatsoever granting the executive branch any authority to assume any legislative role. . . . [I]t neither confers nor implies any power on the part of the Governor to invade, supersede, or assume powers conferred on the Legislature.

TOMAC II, 268 Mich App at 238-239; 708 NW2d 115.

Judge Schuette then turned to the Legislature's purported delegation of its contracting power by mere resolution. Noting this Court's holding in *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505, 510; 15 NW2d 724 (1944), that "a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution," *accord* 72 Am Jur 2d, States, Territories, and Dependencies, § 71, p 457 ("Generally, only persons authorized by the state constitution or a statute can make a contract binding on a state . . . ."), the panel majority held the Governor's amendment power unconstitutional in the absence of a proper delegation of authority:

> Absent a statutory delegation of authority by the Legislature to the Governor to amend a gambling compact, and being mindful of the constitutional prohibition that forbids the executive branch from assuming duties of the legislative branch unless expressly provided for in the Michigan Constitution, any amendment to a gambling compact must be presented to the Legislature for approval, at the very least by legislative resolution.

TOMAC II, 268 Mich App at 241-242; 708 NW2d 115. *Accord TOMAC I*, 471 Mich at 407; 685 NW2d 221 (Markman, J, dissenting) ("The legislature may not, either by resolution or by bill, delegate to the executive branch a broad and undefined power to amend legislation."); *McCartney v Attorney General*, 231 Mich App 722, 729; 587 NW2d 824 (1998) ("there is no constitutional impediment to the Governor's negotiating with an Indian tribe where the product of his negotiations has no effect without legislative approval") (emphasis added).

Judge Schuette concluded by canvassing the authority cited by the State, the Tribe, and the dissent, and correctly concluded that "[a]ll the cases . . . have the embedded premise of a statutory or constitutional delegation of authority to the Governor." *TOMAC II*, 268 Mich App at 243; 708 NW2d 115. In contrast:

> [t]here was no valid delegation of authority to amend gambling compacts in this case. Here, there was no statute or constitutional provision that gave the Governor the authority to unilaterally amend the compacts. This factor makes the cases on which the parties and the dissent rely readily distinguishable.

Id.; 708 NW2d 115 (emphasis added).

Having held the amendment power an unconstitutional violation of the Michigan Constitution's separation of powers, the Court of Appeals did not then consider the constitutionality of the Granholm Amendment, as this Court directed. *TOMAC II*, 268 Mich App at 246; 708 NW2d 115 ("We decline to address plaintiffs' additional argument"). Had the Court of Appeals done so, it would have further concluded that the Granholm Amendment's revenue sharing provision violates the Michigan Constitution's Appropriations Clause, and that the revenue sharing payments in the original compacts suffer from the same constitutional infirmity.

TOMAC respectfully requests that this Court affirm the Court of Appeals' analysis of the amendment power generally, but that the Court go further and hold that the Legislature may not appropriate State funds by resolution. Such a holding would invalidate the compacts in their entirety, giving the Legislature the opportunity to address the troubling fact that only one of the seventeen Tribal casinos operating in Michigan today is currently making revenue sharing payments to the State. (TOMAC Br in Sup Ct Case No 129816, pp 1-2 & n 2.)

ARGUMENT

The Court of Appeals correctly held that the amendment provision of the compacts violated Const 1963, art 3, § 2. *TOMAC II*, 268 Mich App at 237; 708 NW2d 115.

The Court of Appeals' reasoning was simple and straightforward: "only persons authorized by the state constitution or a statute can make a contract binding on a state." *Id.* at 241; 708 NW2d 115 (quotation omitted). Because the Governor's purported power to amend the compacts is authorized by mere resolution, not by constitution or statute, the power is void.

In addition, the redirection of State monies the Governor effectuated through the Granholm Amendment is an appropriation of State funds, a right the Legislature alone must carry out "by law." Const 1963, art 9, § 17. But no legislative appropriation has ever approved the Governor's Amendment or, for that matter, the revenue sharing payment structure of the underlying compacts. Because the monetary terms of the original compacts, including the Odawa compact as amended, are expressly non-severable (Compact § 12 E, App 18a), this defect in the approval of the monetary provisions invalidates not only the Granholm Amendment, but also the original compacts in their entirety.

I. THE COMPACTS' AMENDMENT PROVISION IS UNCONSTITUTIONAL.

A. The Compacts' Amendment Provision Violates The Separation Of Powers Clause.

In *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004), this Court emphatically reaffirmed its commitment to enforcing the strict separation of powers mandated by Michigan's 1963 Constitution. The State tests that commitment here, asking this Court to approve the Legislature's delegation of its contracting power to the Governor by mere resolution. This Court should reject the State's request to retreat from the *Cleveland Cliffs* decision, and it should affirm the Court of Appeals' holding that the Governor may not exercise the Legislature's contracting power in the absence of an affirmative constitutional or statutory delegation of that authority.

On remand below, TOMAC and the State agreed that the disputed issue involved the Legislature's delegation of its contracting power. (*See, e.g.*, State's Supplemental Br on Remand at 12 ("The type of power delegated to the Governor by the Legislature was not law-making power; it was *contracting* power.") (underlined emphasis added).) And the requirements the Michigan Constitution imposes on the Legislature when it seeks to delegate its contracting power have been settled in this state for well over 60 years:

> Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution.

Roxborough v Michigan Unemployment Comp Comm, 309 Mich 505, 510; 15 NW2d 724 (1944) (quoting 59 CJ § 286, pp 172, 173) (emphasis added); *accord Sittler v Bd of Control of Michigan Coll of Mining & Tech*, 333 Mich 681; 53 NW2d 681 (1952) (following *Roxborough*); 72 Am Jur 2d, States, Territories, and Dependencies, § 71, p 457 (2001) ("Generally, only persons authorized by the state constitution or a statute can make a contract binding on a state . . . ."); *see also Meredith v Ieyoub*, 700 So 2d 478 (La, 1997) (invalidating contingency fee contracts between attorneys and Louisiana Attorney General, because no state constitutional or statutory provision authorized the Attorney General to make such a contract); *McCartney v Attorney General*, 231 Mich App 722, 729-730; 587 NW2d 824 (1998) (stating that "the Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature" and that the Governor's negotiations had "no effect without legislative approval.") (emphasis added).

Here, there is no constitutional or statutory authority supporting the Legislature's delegation of its contracting power to the Governor for the compacts' amendment. That delegation is therefore invalid on its face, notwithstanding the Legislature's apparent acquiescence in

the process. *Cleveland Cliffs*, 471 Mich at 617; 684 NW2d 800. The Court of Appeals correctly so held.[3]

The Tribe's and State's arguments to the contrary are not persuasive. The State's principal argument is that the compacts' amendment provision is not actually a delegation of contracting power at all, but instead the result of a mutual agreement addressing the ground rules for compact modification. (State Br at 12-18.) But in the Court of Appeals, the State conceded that the issue presented was actually one concerning delegated legislative power. (State Supplemental Br on Remand at 12 ("The Amendment Provision reflects the delegation of that amending power to the Governor."); *id.* ("The Legislature's transfer of contracting power to the Governor does not run afoul of the Separation of Powers Clause because there are specific limits on the exercise of such power."); *id.* at 14 ("Michigan's courts have long deferred to the Governor's discretion in exercising delegated authority.") (emphases added).) And the State is, of course, barred from taking the opposite position in this Court.

In addition, the State's primary argument is bad constitutional law. Under the State's theory, the Legislature is free to trump the protections of Michigan's Constitution simply by contracting around them, something the law does not even allow private contracting parties to accomplish. *See, e.g., Skutt v Grand Rapids*, 275 Mich 258, 265; 266 NW 344 (1936) ("When a contract is contrary to some provision of the Constitution, . . . it is prohibited by the

[3] Although this Court has decided that compacting does not require legislation by bill, that does not mean the Governor is free to act solely on her own, or that the Legislature need not be involved. Other courts have determined that compacting requires legislative involvement, regardless of whether a bill is required. *See, e.g., Stephan v Finney*, 836 P2d 1169, 1185 (Kan, 1992) (holding that the governor had neither inherent nor delegated authority to signs compacts on behalf of state); *Clark v Johnson*, 904 P2d 11, 23 (NM, 1995) (same); *Saratoga County Chamber of Commerce v Pataki*, 798 NE2d 1047, 1061 (NY, 2003) (same). Thus, when a Governor enters into or amends an IGRA compact, there must be a valid delegation from the Legislature to the Governor for that activity.

Constitution."); *cf. WPW Acquisition Co v Troy*, 466 Mich 117, 124-125; 643 NW2d 564 (2002) (noting that statutes cannot be interpreted in a manner inconsistent with the Constitution). For example, what if the resolution-approved compacts had authorized the State to sue the Tribes in Michigan courts based on hypothetical questions, rather than concrete disputes? The State would argue that such a provision does not purport to be an expansion of the judicial power, but rather merely expresses the parties' mutual ground rules for litigating disputes under the compacts. Presumably, this Court would refuse to uphold such a provision as an unconstitutional expansion of the judicial power, notwithstanding the parties' "agreement."

The State also argues that the amendment provision must be interpreted to allow the Governor the unilateral power to amend the compacts, or the provision will be rendered meaningless. (State Br at 17.) This argument makes no sense; if the Legislature's purported delegation of its contracting power is constitutionally infirm, the amendment provision by definition will be rendered meaningless. There is nothing improper about that result.

For its part, the Tribe asserts that the *Roxborough* holding is mere dicta. (Tribe Br at 22.) But *Roxborough's* statements about the limits on the Legislature's ability to delegate contracting power were part of a carefully crafted separation of powers holding which is relied on by Michigan courts today. *See, e.g., Conway Greene Co. v State of Michigan*, No. 242177, 2003 Mich App LEXIS 3257, at *7-8 (Mich Ct App, Dec 16, 2003) (App 227a) (" public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or constitution.") (quoting *Roxborough*). And *Roxborough*'s holding was and is well supported. *See, e.g., Roxborough*, 309 Mich at 510; 15 NW2d 724 (citing 59 CJ § 286, pp 172, 173); 72 Am Jur 2d, States, Territories, and Dependencies, § 71, p 457.

The State and the Tribe together attempt to distinguish *Roxborough* by arguing that it is inconsistent with *TOMAC I*'s holding that Tribal-State gaming compacts can be approved by mere resolution.[4] (State Br at 18-21; Tribe Br at 15-22.) But legislative approval by resolution of known, negotiated contract terms, as was the case in *McCartney* and *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), is radically different than "pre-approval" of unknown, yet-to-be negotiated terms, as is the case here. That difference justifies a regime where negotiated compacts can be approved by resolution, while delegation of the Legislature's contracting power requires a statutory enactment, just as *Roxborough* and the Court of Appeals below have held.

Finally, the Tribe makes the alarming argument that the compacts are "extraconstitutional agreements" to which normal constitutional rules do not apply. (Tribe Br at 26-29.) This position is at odds with *TOMAC I*, in which this Court held that the compacts were true bilateral contracts, not some new, extraconstitutional creature, unbound by all known rules that currently govern our Legislature. And it is also directly at odds with the State's position that "the Compacts are contracts," and that the amendment provision is "part of a bilateral

[4] The Tribe also notes that the Governor is to be given deference in her actions and it is to be assumed that she carries out her duties in compliance with the Constitution. (Tribe Br at 19.) But the Governor's actions are irrelevant to whether she has been granted proper authority. If the underlying grant of the amendatory power by the Legislature is invalid, then the Governor cannot ever exercise that power in a constitutional fashion. In addition, a grant of power by the Legislature to the Governor, as compared to an administrative agency, is arguably a cause for greater concern because the Legislature has fewer means to control or limit the Governor's actions in the future. *See Gilbert v State of Wisconsin Medical Examining Bd*, 349 NW 2d 68, 75-76 (Wis, 1984) (noting that delegations to an agency may be reviewed with a "more liberal attitude" than delegations to another branch because an agency is subject to "more rigid control" by the legislature); *accord Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 528; 294 NW2d 60 (1980) ("the delegation doctrine has an underlying core of validity in that it requires that those who have been selected by a given process and from a given constituency retain the power to make ultimate policy decisions and override decisions made by others."). Indeed, the Tribe argues that the Legislature is constitutionally barred from conditioning the Governor's exercise of power delegated to her. (Tribe Br at 30.)

agreement" that, "like all other terms of the Compact, is the product of the *mutual assent* of the State and the Tribe." (State Br at 6, 11-13, 15 (emphasis in original).) The State correctly concludes: "Principles of contract law, therefore, apply to the Compacts." (*Id.* at 13.)[5]

In sum, the State and Tribe have been forced to take extreme positions to challenge the irrefutable logic of the Court of Appeals' opinion below: the State is now denying that this case presents a delegation of power issue when the State characterized it as such in the Court of Appeals, the Tribe is characterizing the compacts as a heretofore unknown extraconstitutional agreement, and both the State and the Tribe believe that the Legislature need not comply with the Michigan Constitution provided that it do so in a contract rather than a statute. This Court should reject all of these ill-considered theories and affirm that the amendment provisions violate the Separation of Powers Clause of the Michigan Constitution.

B. The Compacts' Amendment Provision Also Violates The Traditional Non-Delegation Doctrine.

The limits placed on the Governor's amendatory power in the compact are minor and illusory. Even if passed by statute, then, the amendment provision would fail under the non-delegation doctrine. This Court should affirm the Court of Appeals' decision for this alternative and independent reason, which TOMAC advanced below, but which was unnecessary for the Court of Appeals to address in light of its holding.

This Court has held that "legislation in which power is delegated to an administrative agency must contain language, expressive of the legislative will, that defines the area within which an agency is to exercise its power and authority." *Westervelt v Natural Res Comm*, 402

[5] The State's position also supports TOMAC's argument that *TOMAC I* necessarily overrules *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), which held that revenue sharing payments under State-Tribal compacts are "gratuitous payments," rather than bargained for contractual consideration, and therefore not subject to the Michigan Constitution's Appropriations Clause. (TOMAC Br in Sup Ct Case No 129816, pp 8-9.)

Mich 412, 439; 263 NW2d 564 (1978) (emphasis added). Where such standards do not exist, the Governor is effectively exercising the Legislature's own plenary power, a power this Court has held the Legislature is not free to "give" away. *Cleveland Cliffs*, 471 Mich at 613; 684 NW2d 800 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the constitution.") (quoting Const 1963, art 3, § 2).

Blue Cross & Blue Shield v Milliken, 422 Mich 1; 367 NW2d 1 (1985), *cert den*, 474 US 805 (1985), illustrates the point. Blue Cross filed a complaint for declaratory judgment challenging the constitutionality of the Nonprofit Health Care Corporation Reform Act. The Act required health care corporations to assign a risk factor for each line of the corporation's business in accord with "sound actuarial practices," and directed the Insurance Commission to either "approve" or "disapprove" the proposed factors. The Legislature provided no guidelines to direct the Insurance Commissioner's response; if the risk factors were disapproved, a panel of three actuaries were to determine a risk factor for each line of business, again with no further directions set forth to guide the panel. *Id.* at 52-53; 367 NW2d 1.

This Court concluded that the "actuarial guidelines" provided sufficient guidance for the nonprofit health care corporations, but that in contrast:

> the power delegated to the Insurance Commissioner is completely open-ended. The commissioner is starkly directed to "approve" or "disapprove" the proposed risk factors; the basis of the evaluation is not addressed.

Id. at 53; 367 NW2d 1 (emphasis added). Accordingly, the Court held the Act "constitutionally impermissible." *Id.* at 55; 367 NW2d 1.

Here, the compacts baldly abdicate to the Governor the unilateral power to bind the State to compact amendments. There is no legislative constraint. The Governor could

amend a compact to provide one additional casino, as she did here, or two, or 10, or 100. The Governor could also alter the legal gambling age at the casinos, raising it to age 21, or reducing it to age 7. There is simply nothing that restrains her.[6] Accordingly, the compact amendment provision is likewise "constitutionally impermissible" under the separation of powers clause and must be struck from the compacts.

The Tribe tries to save the delegation by arguing that the Governor only has the power to amend. (Tribe Br at 28.) But this misses the point when the power to amend has no effective bounds. The Insurance Commission in *Blue Cross* could not act outside the very narrow sphere of approval or disapproval of risk factors designated by Michigan health care corporations, *Blue Cross*, 422 Mich at 52-53; 367 NW2d 1, yet this Court did not consider that restriction a limitation sufficient to render the delegation constitutionally permissible, because the Legislature's delegation of its power was unrestricted within the delegated field.

Likewise here, it is irrelevant that the amendment provision as originally drafted prohibits an expansion of the geographic scope of tribal gaming. (State Br at 13-14.) The power to amend necessarily includes the power to contract around any previously agreed upon limitation. *See Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003) ("Whenever two men contract, no limitation self-imposed can destroy their power to contract again."). And this geographical prohibition, which was designed to protect the Detroit casinos from competition, does not limit the Governor's authority regarding the numerous other possible amendments she might make. (*See* Compact § 16, App 20a-21a.) The amendment provision of the compacts is therefore facially invalid as an unconstrained delegation of the Legislature's contracting power, and it must be struck from the compacts.

[6] The Tribe actually argues that any attempt to restrain the Governor's exercise of the delegated power would be unconstitutional. (Tribe Br at 30.)

II. THE GRANHOLM AMENDMENT VIOLATES THE MICHIGAN CONSTITUTION BECAUSE IT PURPORTS TO GIVE THE GOVERNOR DISCRETIONARY POWER TO ALLOCATE STATE MONIES WITHOUT THE SUPPORT OF A LEGISLATIVE APPROPRIATION. BECAUSE THE ORIGINAL COMPACTS SUFFER FROM THE SAME CONSTITUTIONAL INFIRMITY, ALL OF THEM MUST BE HELD INVALID.

The most constitutionally significant change the Granholm Amendment made to the Odawa compact was to redirect revenue sharing payments from the Michigan Strategic Fund ("MSF") to whomever the Governor chooses. (Amendment § 17(C), App 63a (providing for "[p]ayment to the State, as directed by the Governor or designee").) In other words, the Governor, with no input or ratification from the Legislature, granted herself the open-ended and unlimited power to direct the flow of this "important revenue to the State." (Compact § 17(A), App 21a.)

The Separation of Powers Clause precludes such conduct, because the power to appropriate States funds is reserved exclusively to the Legislature. Const 1963, art 9, § 17 (state funds must be appropriated "by law"); *Civil Service Comm of Michigan v Auditor General*, 302 Mich 673, 682; 5 NW2d 536 (1942) ("The control of the purse strings of government is a legislative function[,] . . . not to be surrendered or abridged save by the Constitution itself."); Br of Amici Curiae Ken Sikkema & Shirley Johnson at 30 ("the Governor cannot claim the constitutional authority to direct the payment of State funds in the manner contemplated by the amendatory agreement"). Lacking an underlying legislative appropriation, then, the Granholm Amendment is invalid on its face.

As explained in more detail in TOMAC's brief in Michigan Supreme Court Case No. 129816, the Granholm Amendment's constitutional infirmity is also present in the payment terms of the original compacts themselves. Because the original compacts direct revenue sharing payments directly to the MSF, rather than the State Treasury, and are not supported by a legis-

lative appropriation, those payment provisions are invalid. (TOMAC Br at 9-11.) And, since the payment provisions are subject to the compact's non-severability clause, the compacts are invalid in their entirety. (TOMAC Br at 11-12.)

Anticipating this argument, the Tribe takes the position that the Appropriations Clause of the Michigan Constitution applies only to monies paid "out of the State Treasury" and is inapplicable where the Governor merely directs funds "to the State." (Tribe Br. at 35-36.) The Tribe cites no authority for this incredible position, which would allow the Governor to circumvent the Legislature's appropriation of all incoming funds simply by directing them preemptively "to" some State agency or division.

The Tribe's position is in direct contravention of MCL 18.1441, which expressly requires that "receipts of state government from whatever source" be deposited pursuant to directives by the State treasurer. MCL 18.1441 (emphasis added)[7]; *accord Civil Service Comm*, 302 Mich at 682; 5 NW2d 536 ("The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system."). And, in recognition of both legal and practical realities, the State itself has already conceded in these proceedings that the location of the funds' deposit is irrelevant: "the question is whether

[7] The same is true if the tribal revenue sharing payments are characterized as "grants" or "gifts":

> Whenever any grant, devise, bequest, donation, gift or assignment of money . . . shall be made to this state, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pas to this state; and . . . all other property or thing of value, so received by the state as aforesaid, shall be reported by the governor to the legislature, to the end that the same may be covered into the state treasury or appropriated . . . as may be here after directed by law.

MCL 21.161 (emphasis added).

the character of the funds and the manner in which they were obtained makes them state funds subject to the Appropriations Clause." (State Supp Br on Appeal at 20-21 (quoting *Tiger Stadium,* 217 Mich App at 447-448).)[8] Accordingly, this Court should reaffirm that all State revenue must be legislatively appropriated, and it should strike down not only the Granholm Amendment, but also the four compacts at issue in this litigation.

CONCLUSION

For the foregoing reasons, TOMAC respectfully requests that this Court declare unconstitutional (1) the Governor's Amendment, (2) the amendment provisions of the four challenged gaming compacts, and (3) the four gaming compacts themselves.

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[8] In fact, all other sources of the MSF's funding are treated as appropriations subject to the control of the Legislature, including disbursement of tobacco settlement revenue to the Fund. *See, e.g.,* 2003 PA 169, App 65a; *Financial Audit of the Michigan Strategic Fund (A Component Unit of the State of Michigan) October 1, 2001 through September 30 , 2003*, App 191.